

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17**

THE SUSAN B. ALLEN MEMORIAL HOSPITAL

and

Case 14-CA-233000

GAY KIMBLE, an Individual

and

Case 12-CA-233898

LORI DASHNER, an Individual

**RESPONDENT SUSAN B. ALLEN MEMORIAL
HOSPITAL'S MOTION TO CONTINUE TRIAL**

Because of developments that occurred at approximately 10:00 a.m. today, June 27, 2019, Respondent requests a continuance of the hearing scheduled for July 1, 2019 until certain legal issues involving attorney-client privilege are briefed by the parties and decided by the Administrative Law Judge. Respondent Susan B. Allen Memorial Hospital ("the Hospital"), by its undersigned attorneys, files this Motion to Request a Continuance of the Trial scheduled for July 1, 2019, and in support thereof states as follows:

1. Trial in this matter is scheduled for July 1, 2019 in El Dorado, Kansas.
2. On January 18, 2019 and January 30, 2019, Respondent submitted exhibits in support of its Statements of Position for these matters.
3. Included in those exhibits was e-mail correspondence among various senior leaders of the Hospital and Forrest Rhodes, the Hospital's attorney at the time. This disclosure was inadvertent.¹

¹ There is no claim of inadvertence on the document labeled A00001, submitted as an exhibit to Respondent's Statement of Position for Lori Dashner. This document is an e-mail that copies Forrest (footnote continued)

4. Respondents attached documents in support of its position statement concerning the claims made by Gay Kimble (the “Kimble Position Statement”).

5. Respondents intended to produce two categories of documents in support of its Kimble Position Statement. The first category is comprised of 50 pages of non-privileged e-mail correspondence and personnel file documents identified by a number in the bottom center of the page, e.g., 1, 2, 55, 106, etc. The second category of documents was Respondent’s Personnel Policy Manual Electronic Communication Devices policy, which is identified by the number 4845-9857-6261.1 in the bottom left-hand corner.

6. In addition to producing the two categories of documents identified above, Respondent inadvertently attached to the Kimble Position Statement 204 pages of e-mail correspondence either sent or received by Respondent employee Mark Rooker. Mr. Rooker’s e-mails are identified by Bates Nos. A00001-00204.

7. Mr. Rooker’s e-mails are replete with attorney-client communications between counsel Forrest Rhodes, Mr. Rooker, and other senior leaders of the Hospital.

8. The production of the Mr. Rooker’s e-mail file was inadvertent. Upon receipt of the file, the NLRB field attorney did not notify Respondent’s counsel of the disclosure of privileged attorney-client correspondence.

9. On June 26, 2019, pursuant to a subpoena seeking Mr. Rooker’s e-mail correspondence, Respondent produced non-privileged documents contained within Mr. Rooker’s e-mail file. No attorney-client correspondence was produced in response to the subpoena.

Rhodes, but does not elicit or contain legal advice and does not constitute privileged attorney-client communications.

10. On June 27, 2019, Lauren Fletcher of the NLRB contacted Respondent and requested additional, privileged documents, claiming Respondent had completely waived the attorney-client privilege. During the telephone conference with Ms. Fletcher, Respondents learned of the inadvertent production of attorney-client correspondence for the first time.

11. Respondent intends to file a motion to claw back all inadvertently produced documents and argue the documents are inadmissible and privileged.

12. If attorney-client privilege is deemed completely waived, Respondent's attorneys would be necessary witnesses to the case, and Respondent would require additional time to obtain other counsel.

13. These important issues are highly contentious, and necessitate a thoughtful and careful review by the Administrative Law Judge.

14. Accordingly, Defendant respectfully requests that the Regional Director postpone the July 1, 2019 trial, establish a briefing schedule for consideration of these issues, and convene the hearing at sometime following the briefing on this important motion in limine.

15. This is the second postponement request made by any party and it will not prejudice the parties.

16. Respondent has provided alternative dates on which the trial could be held: July 8, 2019 and July 9, 2019.

17. The NLRB, through Lauren Fletcher and her supervisor, have invited Respondent to file this motion. Ms. Fletcher has indicated that the NLRB is opposed to any claw back of the documents at issue.

18. Respondent apologizes for the lateness of this motion. Respondent was not aware of the inadvertent disclosure of documents until Ms. Fletcher's telephone call this morning.

WHEREFORE, Respondent respectfully requests that the Regional Director issue an Order postponing and rescheduling the July 1, 2019 trial for a later date, and requests such additional and further relief as this Court deems just and proper under the circumstances.

/s/ Alan L. Rupe

Alan L. Rupe, KS # 08914
LEWIS BRISBOIS BISGAARD & SMITH LLP
1605 N. Waterfront Parkway, Suite 150
Wichita, KS 67206
Telephone: (316) 609-7900
Facsimile: (316) 462-5746
alan.rupe@lewisbrisbois.com

Attorney for Respondent
Susan B. Allen Memorial Hospital

CERTIFICATE OF SERVICE

I hereby certify that on this June 27, 2019, a copy of the foregoing Motion to Postpone Trial was served via e-mail on:

Lauren M. Fletcher
lauren.fletcher@nlrb.gov
Field Attorney
National Labor Relations Board - Subregion 17

Don Peterson
don@graybillhazelwood.com
Attorney for Claimant Gay Kimble

Lori Dashner
Ldashner@cox.net
Claimant

/s/ Alan L. Rupe

Alan L. Rupe